IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1595

COLONIAL PIPELINE COMPANY,
Appellant

versus

JOSEPH N. TRAIGLE, COLLECTOR OF REVENUE,
Appellee

On Appeal from the Supreme Court of the State of Louisiana

BRIEF FOR THE APPELLANT

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INDEX

Page

Opinions Below 1

Jurisdiction 2

Statutes Involved 2

Questions Presented 2

Statement of the Case 3

Summary of the Argument 8

Argument 9

I. A corporation engaged exclusively in the interstate transportation of refined petroleum products in and through Louisiana, having no local activities except those purely incidental to its interstate business, may not constitutionally be subjected to that state's corporation franchise tax 9

II. Louisiana, which admittedly cannot deny or refuse an out of state corporation the right to engage in interstate commerce within the state in corporate form, cannot levy an excise tax upon the privilege of engaging in interstate business in corporate form 20

III. The levy of a state excise tax upon the privilege of engaging in interstate business in the corporate form, coupled with drastic enforcement and collection procedures which authorize complete cessation

Page

of the interstate business, is the equivalent of a state license to engage in interstate commerce and is prohibited by Article I, Section 8, Clause 3 of the Constitution 22

Conclusion 27

Appendix 29

CITATIONS

Page

Cases:

Colonial Pipeline Company vs. Mouton, Collector of Revenue, 228 So.2d 718, writ refused 231 So.2d 393 (La. 1969) 3, 7, 11

Crutcher vs. Kentucky, 141 U.S. 47, 35 L.Ed. 649, 11 S.Ct. 851 (1891) 20, 21, 25, 26

Dahnke-Walker Milling Co. vs. Bondurant, 257 U.S. 282, 66 L.Ed. 239, 42 S.Ct. 106 (1921) 21

General Motors Corp. vs. Washington, 377 U.S. 436, 12 L.Ed.2d 430, 84 S.Ct. 1564 (1964) 15, 26

Great Lakes Pipe Line Co. vs. Oklahoma Tax Commission, 251 P.2d 655 (Okla. 1951) 16

Ideal Cement Co. vs. United Gas Pipe Line, 282 F.2d 574 (1960), cert. denied, 369 U.S. 837, 7 L.Ed.2d 842, 82 S.Ct. 863 (1962) 24

International Text-Book Co. vs. Pigg, 217 U.S. 91, 54 L.Ed. 678, 30 S.Ct. 481 (1910) 21

Kansas City Southern Railway Co. vs. Reily, 242 La. 235, 135 So.2d 915, appeal dismissed, 370 U.S. 289, 8 L.Ed.2d 501, 82 S.Ct. 1561 (1962) 13

Lilly & Co. vs. Sav-On-Drugs, Inc., 366 U.S. 276, 6 L.Ed.2d 288, 81 S.Ct. 1913 (1961) 21

Page

Memphis Natural Gas Company vs. Stone, 335 U.S. 80, 92 L.Ed. 1832, 68 S.Ct. 1475 (1948) 12, 27

Memphis Steam Laundry Cleaner, Inc. vs. Stone, 342 U.S. 389, 96 L.Ed. 436, 72 S.Ct. 424 (1952) 10, 12, 14

Mid-Valley Pipeline Co. vs. King, 431 S.W.2d 277 (Tenn. 1968); appeal dismissed, 393 U.S. 321, 21 L.Ed.2d 517, 89 S.Ct. 556 (1969) 18

Nippert vs. City of Richmond, 327 U.S. 416, 90 L.Ed. 760, 66 S.Ct. 586 (1946) 10

Northwestern States Portland Cement Co. vs. Minnesota, 358 U.S. 450, 3 L.Ed.2d 421, 79 S.Ct. 357 (1959) 13

Ozark Pipe Line Corp. vs. Monier, 266 U.S. 555, 69 L.Ed. 439, 45 S.Ct. 184 (1925) 13

Railway Express Agency, Inc. vs. Virginia, 347 U.S. 359, 98 L.Ed. 757, 74 S.Ct. 558 (1954) 9, 12, 27

Railway Express Agency, Inc. vs. Virginia, 358 U.S. 434, 3 L.Ed.2d 450, 79 S.Ct. 411 (1959) 14, 27

Roadway Express, Inc. vs. Director, 50 N.J. 471, 236 A.2d 577 (N.J. 1967); appeal dismissed, 390 U.S. 745, 20 L.Ed.2d 276, 88 S.Ct. 1443 (1968) 17

Spector Motor Service, Inc. vs. O'Connor, 340 U.S. 602, 95 L.Ed. 573, 71 S.Ct. 508 (1951) 9, 11, 12, 16

Page

Texas Gas Transmission Corp. vs. Atkins, 270 S.W.2d 384 (Tenn. 1954) 16, 18

Wisconsin vs. J. C. Penney Co., 311 U.S. 435, 85 L. Ed. 267, 61 S.Ct. 246 (1940) 26

Constitution:

United States Constitution, Article I, Section 8, Clause 3 ..... 9, 22

Statutes:

28 U.S.C. §1257(2) 2

28 U.S.C. §2101(c) 2

47 La. Rev. Stat. §401 ..... 22, 29

47 La. Rev. Stat. §601 ..... 4, 27, 29, 30

47 La. Rev. Stat. §606 31

47 La. Rev. Stat. §1501 35

47 La. Rev. Stat. §1561 36

47 La. Rev. Stat. §1570 ..... 23, 37

	Page
47 La. Rev. Stat. §1571	23, 37
47 La. Rev. Stat. §1572	23, 38
47 La. Rev. Stat. §1573	23, 38
47 La. Rev. Stat. §1574	38
47 La. Rev. Stat. §1577	24, 40
47 La. Rev. Stat. §1641	23

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On Appeal from the Supreme Court of the State of Louisiana

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The opinion of the Louisiana Court of Appeal, First Circuit, is reported at 275 So.2d 834. The opinion of the Supreme Court of Louisiana, reversing the judgment of the Court of Appeal, is reported at 289 So.2d 93.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered January 14, 1974 (printed in Jurisdictional Statement, page 25). That Court refused appellant's application for rehearing on February 15, 1974. Notices of appeal were filed March 28, 1974. The Jurisdictional Statement was filed April 25, 1974 and probable jurisdiction was noted June 17, 1974. The jurisdiction of this Court rests upon 28 USC 1257(2) and 2101(c).

STATUTES INVOLVED

Sections 401, 601, 606, 1501, 1561, 1570, 1571, 1572, 1573, 1574, 1577 and 1641 of Title 47 of the Louisiana Revised Statutes (La. Rev. Stat.) are set out verbatim in the appendix attached hereto.

QUESTIONS PRESENTED

1. Whether this Court's decisions in *Spector Motor Service v. O'Connor*, 340 U. S. 602, 95 L.Ed. 573, 71 S.Ct. 508 (1951), *Railway Express Agency v. Virginia*, 347 U. S. 359, 98 L.Ed. 757, 74 S.Ct. 558 (1954) and *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U. S. 389, 95 L.Ed. 436, 72 S.Ct. 424 (1952) are still viable delineations of the limitations imposed by the Commerce Clause of the Federal Constitution upon the power of the states to tax interstate commerce.

2. Whether a corporation engaged exclusively in the interstate transportation of petroleum products in and through Louisiana, having no local activities except those purely incidental to its interstate business, may be constitutionally subjected to Louisiana's corporation franchise tax.

3. Whether Louisiana, which admittedly cannot deny or refuse an out of state corporation the right to engage in interstate business within the state in corporate form, may levy an excise tax upon the privilege of engaging in interstate business in corporate form.

4. Whether the levy of the state excise tax upon the privilege of engaging in interstate business in corporate form, coupled with summary and drastic enforcement and collection procedures which authorize complete cessation of the interstate business, is the equivalent of a state license to engage in interstate commerce and thus prohibited by Article I, Section 8, Clause 3 of the Constitution.

STATEMENT OF THE CASE

This is an action for refund of corporation franchise taxes paid under protest by a corporation engaged exclusively in interstate commerce in Louisiana. In 1969 the Louisiana courts held that the franchise tax levied by Louisiana Revised Statute 47:601 could not be constitutionally applied to Colonial under circumstances where "anything and everything" done by Colonial "since its original entry into the State of Louisiana has been purely incidental to its business as a common carrier engaged solely in interstate commerce." *Colonial Pipeline Company v. Louton*, 228 So.2d 718, writ refused 231 So.2d 393 (La. 1969).

In 1970, the Louisiana legislature amended and re-enacted L.R.S. 47:601. Both the state District Court and the Court of Appeal held that the 1970 amendment did not change the operating incidence of the corporation franchise tax. The Supreme Court of Louisiana nonetheless reinterpreted the

statute, holding that the tax is levied upon the privilege of engaging in business in Louisiana in the corporate form and that Colonial is subject to the tax despite the interstate nature of its operations in Louisiana.

Colonial is a Delaware corporation with its principal office in Atlanta, Georgia (Pl. Ex. 6, R45, A43). The pipeline stretches from the Houston, Texas area to the New York harbor area (testimony of Whitaker, Pl. Ex. 17, p. 5-6, R51) with about 3500 miles of main and "stub" lines (only 258 of which are located in Louisiana, R51). Colonial links the great oil refining complexes of East Texas and Louisiana with the population centers of the Southeast and Northeast, delivering more than one million barrels per day of essential gasolines, fuel oils, diesels, and distillates in fourteen states and the District of Columbia (Pl. Ex. 14, R48, A56). The pipeline, with its main line, lateral lines, pumping stations, tank farms and other related facilities, is a true common carrier under the jurisdiction of the Interstate Commerce Commission (testimony of Whitaker, Pl. Ex. 17, p.19, p.41, R51); it owns none of the products it carries but simply transports them for others under a published tariff (testimony of Whitaker, Pl. Ex. 17, p.4, p.41, R51; Pl. Exh. 10(a), 10(b) and 10(c), R47). The flow chart (Pl. Ex. 11, R47) and the list of shippers and consignees (Pl. Ex. 12, R48) show that in the month of June 1971, Colonial delivered nearly 36,000,000 barrels of 30 different refined products from 24 different shippers to 50 different consignees. Clearly this pipeline is a vital link in the nation's energy network.

All of Colonial's activities in Louisiana are in interstate commerce. Although it both originates shipments and delivers products in Louisiana, all of the products delivered originate

in Texas and all of the products originating in Louisiana are delivered into states further to the East (testimony of Whitaker, Pl. Ex. 17, p.22, R51).

Colonial's facilities in Louisiana consist of 258 miles of pipeline (R51), a combination origin and booster station at Lake Charles, a booster station at Welsh, a delivery point at Opelousas, a booster station at Krotz Springs, a booster station at Church Point, a combination origin, booster and stub line delivery point at Baton Rouge, a booster station at Felixville and tankage at Lake Charles and Baton Rouge (testimony of Whitaker, Pl. Ex. 17, p.8, 9 & 10, R51, and Pl. Ex. 7, R45). No intrastate shipments are made in Louisiana (testimony of Whitaker, Pl. Ex. 17, p.16, p.36 & 37, R51). The booster stations are located approximately 30 miles apart throughout the length of the line and their function is to boost the velocity of the fluid in the pipeline sufficiently to move it to the next relay station (testimony of Whitaker, Pl. Ex. 17, p.16, p.43, R45). The tankage is used in injecting products into the line and in making deliveries (Pl. Ex. 7, R45). All of the relay or booster stations are operated by remote control from Atlanta by computer (testimony of Whitaker, Pl. Ex. 17, p.24, p.36, R51).

The state courts concede that all of Colonial's facilities are used exclusively in furtherance of its interstate shipments, for the Louisiana Supreme Court found:

> ". . . of the total pipeline mileage owned by Colonial, approximately 258 are located in the State of Louisiana (in 1963 there were 217 miles of pipeline located in Louisiana). Over this distance, there are several booster pumping stations which keep the product flowing at a sustained rate, and at various collection points (chiefly

Lake Charles and Baton Rouge) there are tank storage facilities. To maintain and help operate this line, Colonial keeps[1] approximately 25-30 employees in this State. These consist of various classifications of mechanics, electricians and other workers whose chief duties are to inspect the line and to perform maintenance chores. There were no administrative officers or personnel in this State during 1970 and 1971, although prior to this time, including the year 1963, Colonial had maintained a Division office in Baton Rouge.

"In its operation in Louisiana, Colonial has apparently done no intrastate shipping of petroleum products. Loads or batches are picked up outside the state and deposited within the state, and picked up within the state for transportation elsewhere. There are apparently no facilities in this state, except for those in Lake Charles and Baton Rouge, for injecting or withdrawing products from the line."[1] (Opinion; printed in Jurisdictional Statement, p.26)

Thus, the state courts themselves have determined that the business actually carried on by Colonial has, at all times, been exclusively interstate commerce and all of its facilities have been utilized exclusively in furtherance of its interstate business. The Collector has conceded and the Louisiana courts have held that there is no question but that anything and everything done by this corporation since its original entry into the State of Louisiana has been purely incidental to its business as a common carrier engaged solely in the interstate transportation of vital energy products.

On May 9, 1962, Colonial qualified to do interstate business in Louisiana and has remained so qualified since that

[1] Actually there is a small delivery point at Opelousas also (Pl. Ex. 7, R45, A52).

date (Pl. Ex. 6, R45, A44). Although the Louisiana court refers to Colonial as having "qualified to do business in Louisiana" (opinion, Jurisdictional Statement, p.26), Plaintiff's Exhibit 6 clearly shows that Colonial specifically limited its qualification in Louisiana to the doing of **interstate** business. (A44).

In 1963 the Collector sought to impose the Louisiana franchise tax on Colonial's activities. Colonial paid the tax under protest and successfully prosecuted a suit for its refund, based upon the proposition that the Louisiana tax could not be constitutionally applied to Colonial's exclusively interstate operations. Both the Louisiana Court of Appeal, First Circuit, and the Supreme Court of Louisiana concluded that the tax could not be constitutionally applied to Colonial. *Colonial Pipeline Company v. Mouton, supra.* That decision became final in 1969.

Thereafter, the Louisiana Legislature by Act 325 of 1970, amended L.R.S. 47:601, and the Collector renewed his efforts to impose the franchise tax on Colonial, claiming taxes due for each of the years 1970 and 1971 (Pl. Exs. 2 and 3, R44). Colonial paid the tax under protest for the years in question (Pl. Ex. 4, R44 and Pl. Ex. 5, R45) as authorized by L.R.S. 47:1576, and filed this suit for a refund. It has been stipulated that the tax paid for 1970 was $80,635.02,[2] that the tax paid for 1971 was $69,884.78 and that the total refund to which Colonial would be entitled, if successful in these proceedings, is the sum of $150,719.80 (Pre-Trial Order, R26, A25).

[2] The Louisiana Supreme Court held that Colonial was liable only for the minimum tax for 1970 and reduced this amount to $10.

Colonial pays ad valorem taxes to Louisiana and ten of its parishes, as well as state income taxes. For the years 1970 and 1971, ad valorem taxes totaled $743,561.34 and income taxes totaled $196,621.00 (Pl. Ex. 8, R46).

The Louisiana District Court and the Court of Appeal, First Circuit, both held that the 1970 amendment to Louisiana's franchise tax did not change the operating incidence of the tax and that it could not be constitutionally applied to Colonial's interstate activities. The Supreme Court of Louisiana granted a writ of review and reversed the lower courts holding that the operating incidence of the tax, even before the 1970 amendment, was upon the privilege of engaging in business in Louisiana in corporate form rather than simply upon the privilege of engaging in business in Louisiana.

It is from this Judgment that appellant has brought this appeal.

SUMMARY OF THE ARGUMENT

The states may not "carve out" an "incident from the integral economic process of interstate commerce" as the operating incidence of an excise tax such as the Louisiana franchise tax.

Colonial's **right** to engage in its interstate business in Louisiana is not subject to that state's grant or denial, and thus is not subject to Louisiana's taxing power. Nor is Colonial's **right** to engage in its interstate business in Louisiana in corporate form subject to that state's grant or denial.

A franchise tax laid upon Colonial's doing business in corporate form is a tax upon an incident "carved out" of the

"integral economic process of interstate commerce." Thus, the practical operating result of the Louisiana tax is a privilege, license or occupation tax upon Colonial's interstate transportation business in circumstances where Louisiana may not grant or deny Colonial's right to so operate and the state does not contribute to the furtherance of Colonial's interstate business. Where Louisiana can shut off the flow of interstate commerce through collection procedures which could compel a cessation of Colonial's interstate business in the absence of payment, the Louisiana franchise tax lays a burden on interstate commerce, prohibited by Article 1, Section 8, Clause 3 of the Constitution of the United States (the Commerce Clause).

ARGUMENT

I

A CORPORATION ENGAGED EXCLUSIVELY IN THE INTERSTATE TRANSPORTATION OF PETROLEUM PRODUCTS IN AND THROUGH LOUISIANA, HAVING NO LOCAL ACTIVITIES EXCEPT THOSE PURELY INCIDENTAL TO ITS INTERSTATE BUSINESS, MAY NOT CONSTITUTIONALLY BE SUBJECTED TO THAT STATE'S CORPORATION FRANCHISE TAX.

This appeal presents substantial constitutional questions involving the extent of the taxing power of the states over foreign corporations engaged exclusively in interstate transportation. In *Spector Motor Service v. O'Connor*, 340 U.S. 602, 95 L.Ed. 573, 71 S.Ct. 508 (1951) and *Railway Express Agency v. Virginia*, 347 U.S. 359, 98 L.Ed. 757, 74 S.Ct. 558 (1954) (the first *Railway Express* case) this Court made it plain that Article I, Section 8, Clause 3 of the Constitution

of the United States prohibits a state franchise tax, the operating incidence of which falls upon the privilege of carrying on exclusively interstate transportation in and through the state. In *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389, 96 L.Ed. 436, 72 S.Ct. 424 (1952), this Court made it equally plain that it would not permit the states to "carve out" an "incident from the integral economic process of interstate commerce" as the operating incidence of an excise tax, for to do so would result in "a local obstruction to the flow of interstate commerce that cannot stand under the Commerce Clause."

The decision of the Supreme Court of Louisiana sustaining the Louisiana excise tax levied upon Colonial's franchise for the privilege of carrying on exclusively interstate transportation in the state **in corporate form** is but the latest in a series of state court decisions maintaining successively more direct state levies upon interstate commerce. This appeal raises for determination just how far the states may constitutionally go in taxing exclusively interstate business through the device of fragmentizing the "doing business" concept, and by a tax levied on one fragment of the entire economic process of doing interstate business, impose a privilege, license or franchise tax on the interstate business itself.

We take it as established that appellant's right to engage in the interstate transportation business in Louisiana is not subject to that state's grant or denial, and thus not subject to that state's taxing power. *Nippert v. City of Richmond*, 327 U.S. 416, 90 L.Ed. 760, 66 S.Ct. 586 (1956). We further take it as established that appellant's right to engage in interstate business in Louisiana in corporate form is not subject to that state's grant or denial, and that a license, privilege or

occupation tax levied upon the privilege of engaging in interstate business is invalid. *Spector Motor Service, supra.* Nonetheless, Louisiana has declared in effect: while we acknowledge that we cannot levy a tax upon a corporation's franchise to do interstate business, we can and do tax the corporation's franchise to do such business **in the corporate form.** To accomplish that, Louisiana has reinterpreted its franchise tax statute, redesignating the operating incidence of tax as a tax on doing business in corporate form (representing the taxable local incident) as a means of avoiding the "doing business" concept; thus further fragmenting it.

We say that Louisiana has "reinterpreted" its franchise tax, for in 1969, the Louisiana courts construed the Louisiana corporation franchise tax to be an exaction levied upon the privilege of doing business in Louisiana and, citing *Spector Motor Service, supra*, held that the tax could not be constitutionally applied to Colonial because Colonial was engaged exclusively in the interstate transportation of refined petroleum products in and through that state. *Colonial Pipeline Company v. Mouton*, 228 So.2d 718, writs refused 231 So.2d 393 (La. 1969). After the Louisiana Legislature adopted an amendment to the statute[3] which did not change the nature or incidence of the franchise tax,[4] the Supreme Court of Louisiana held in the present case that the state could constitutionally tax Colonial's interstate transportation business because it was not taxing "the general privilege of doing interstate business" but the privilege of doing that business in cor-

[3] Act No. 325 of 1970, amending L.R.S. 47:601; set out in Appendix C of the Jurisdictional Statement, p. 52, and the Appendix hereto, p. 30.

[4] There was dispute as to the effect of the 1970 amendment but the Louisiana Supreme Court held that assuming there has been no essential change in the statute it would nevertheless hold as it did, not withstanding the earlier contrary decision of the Louisiana Court of Appeal in which writs were refused. Jurisdictional Statement, p. 32.

porate form, predicating the tax upon privileges enjoyed by corporations.

The basis of the state court holding is summed up in the following language of the opinion:

> "The fact that the corporate form of doing business is inextricably interwoven in a foreign corporation's doing business in the State, does not in our view detract from the fact that the local incident taxed is the **form of doing business** rather than the business done by that corporation. And it is our view that the local incident is real and sufficiently distinguishable, so that taxation thereof does not, under the controlling decisions of the United States Supreme Court, violate the Commerce Clause." (Jurisdictional Statement, p. 40; emphasis by the Court)

The Louisiana Supreme Court, as well as the highest courts of other states, has seized upon certain decisions of this Court as signifying a retreat from the clear holdings of cases such as *Spector Motors, Railway Express*, and *Memphis Steam, supra*. The state court here concludes that the following decisions of this Court demonstrate "inroads into the tax immune status of exclusively interstate activity." (Jurisdictional Statement, p. 37).

Memphis Natural Gas Company v. Stone, 335 U.S. 80, 92 L.Ed. 1832, 68 S.Ct. 1475 (1948), although decided prior to *Spector Motors*, is one of those cases frequently cited. **That case involved a gas pipeline company which actually made sales of its products in Mississippi.** This Court held that it was bound by the determination of fact made by the Mississippi Supreme Court that certain of the corporation's activities in Mississippi were of a local nature, sufficiently separate and apart from the flow of commerce to support state taxation. The tax involved in *Memphis Gas* was measured by capital stock, basically therefore, a property measure, similar to the "in lieu" tax subsequently approved in *Railway Express, infra*.

Here, appellant is a common carrier of refined petroleum products, operating under the jurisdiction of the Interstate Commerce Commission. Colonial makes no sales of any sort in Louisiana; its business is purely interstate transportation of refined petroleum products for others at tariffs approved by the Interstate Commerce Commission. As was the fact situation in *Ozark Pipe Line Corp. v. Monier*, 266 U.S. 555, 69 L.Ed. 439, 45 S.Ct. 184 (1925), all of Colonial's activities within the state of Louisiana are admittedly, ". . . exclusively in furtherance of its interstate business, and the property itself, however extensive or of whatever character, * * * likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business." (266 U.S. at 565, 69 L.Ed. at 443, 45 S.Ct. at 184).

In addition, unlike the tax in *Memphis Gas*, the Louisiana franchise tax includes "surplus, undivided profits, and borrowed capital" in the tax base (La. Rev. Stat. 47:606 A), as a consequence of which stocks and bonds physically located outside the State of Louisiana are includible in the allocation formula. *Kansas City Southern Railway Co. v. Reily*, 242 La. 235, 135 So.2d 915, appeal dismissed, 370 U.S. 289, 8 L.Ed.2d 501, 82 S.Ct. 1561 (1962).

Another decision relied upon by the state court is *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 3 L.Ed.2d 421, 79 S.Ct. 357 (1959), in which this Court

sustained a properly apportioned state net income tax levied upon a corporation engaged in interstate commerce. Louisiana and other states have used this decision as justification for disregarding *Spector Motor Service*, and for approving state franchise tax levies upon exclusively interstate business, despite the positive recognition in *Northwestern* that *Spector Motor Service* "was not a levy on net income, but an excise or tax placed on that franchise of a foreign corporation engaged 'exclusively' in interstate operations." Moreover, Colonial pays and has not complained about the levy of the substantial income tax imposed upon net income by Louisiana, but it does complain about paying both, particularly when appellant is also paying substantial amounts of state and local ad valorem taxes on property owned by it in Louisiana.

Railway Express Agency v. Virginia, 358 U.S. 434, 3 L.Ed. 2d 450, 79 S.Ct. 411 (1959) (the second *Railway Express* case) is also taken by the state court as an erosion of this Court's prior holdings in *Spector*, and in the earlier case of *Memphis Steam Laundry Cleaner, Inc. v. Stone*, all despite the refusal of this Court in *Memphis Steam* to permit fragmentation of the "doing business" concept:

> "If the Mississippi tax is imposed upon the privilege of soliciting interstate business, the tax stands on no better footing than a tax upon the privilege of doing interstate business." (342 U.S. at p. 393, 96 L.Ed. at p. 440)

To paraphrase here "if the Louisiana tax is imposed upon the conduct of interstate business in corporate form," then it stands on no better footing than a tax upon the privilege of doing Colonial's interstate business. This state court reliance upon *Railway Express* as representing a departure from these fundamental principles is obviously misplaced. The significant

distinction between the tax in *Railway Express* and the Louisiana franchise tax is that the Virginia tax was levied *in lieu* of all other taxes on intangible property and in lieu of property taxes on the rolling stock of the corporation. In sustaining the Virginia tax, this Court was careful to point out that it was not "denominated a license tax laid in the 'privilege of doing business in Virginia,' " nor was it "in addition to the property tax," nor was it "a condition precedent to its engaging in interstate commerce in the Commonwealth." It was, in substance, a tax on property, permissible under a long line of cases approving state property taxes as an indirect levy.

The Louisiana tax does not purport to be *in lieu* of any of the other taxes which appellant is paying; it is by any name or interpretation, still a license tax on the privilege of doing business, and as we shall hereafter indicate, it is an effective condition precedent to Colonial's engaging in interstate commerce in Louisiana.

General Motors Corp. v. Washington, 377 U.S. 436, 12 L.Ed.2d 430, 84 S.Ct. 1564 (1964), likewise cited as support for fragmentation of the "doing business" concept, involved a state tax levied upon the corporation and measured by General Motors' substantial gross wholesale sales of motor vehicles in the state. The tax was sustained because of the company's extensive and undisputed local activity in connection with those sales, which activity was sufficiently separate and distinct from the flow of interstate commerce to support the tax. As pointed out above, Colonial here is a common carrier of refined petroleum products, owns no products, and makes no sales in Louisiana.

The trend among the states has been one of steady expan-

sion of this Court's prior holdings and a correspondingly increasingly heavy burden upon interstate commerce, as is illustrated by the state court decisions discussed below.

The Supreme Court of Oklahoma initiated the erosion of this Court's holding in *Spector Motor Service* within a month after this Court announced its opinion. On April 24, 1951, the Oklahoma court decided *Great Lakes Pipe Line Co. v. Oklahoma Tax Commission*, 251 P.2d 655 (Okla. 1951). That case involved an interstate pipeline and an Oklahoma corporation license tax levied "as a condition of existing or doing or attempting to do business in this State measured by capital used, invested or employed in the State." The state court found as a fact that Great Lakes "definitely engaged in intrastate commerce during the period for which it was taxed" (231 P.2d at 659). The opinion, however, contains language to the effect that the tax is being levied not only on the basis of the intrastate commerce but by reason of some fancied distinction between doing business and doing business in a corporate capacity. The Oklahoma court distinguished *Spector Motor Service* as follows:

> "In that case the right to exist was not taxed, but only the privilege of carrying on or doing business in the state of Connecticut . . ." (231 P.2d at 661)

Apparently no attempt was made to secure this court's review of the Oklahoma decision and the finding that the taxpayer was engaged in intrastate as well as interstate business was sufficient to support the levy of the tax under *Spector Motor Service* and prior decisions of this court.

The "inroads" approach of the Oklahoma decision was adopted by the Tennessee Supreme Court in *Texas Gas Transmission Corp. v. Atkins*, 270 SW2d 384 (Tenn. 1954). In that case, the taxpayer did intrastate business in Tennessee; it made sales of gas in the state of Tennessee as well as purchases of gas in that state. In addition, the company had voluntarily qualified to do **intrastate** business in Tennessee thereby gaining rights and privileges which it otherwise would not have acquired. The Tennessee court, however, concluded that the excise tax in question was levied upon the right to do business in Tennessee in corporate form and distinguished *Spector Motor Service* on that basis. Again, the state court fragmented the doing business concept, seizing upon the privilege of engaging in business in corporate form in the state, together with admitted local activities involved in the sale and purchase of gas and the voluntary qualification to do intrastate business as justification for the tax. Again, apparently no attempt was made to secure this court's review of that opinion; but, in any event, the case is clearly distinguishable, both under the facts and the law, from the instant case.

The case of *Roadway Express, Inc. v. Director*, 50 N.J. 471, 236 A.2d 577 (1967, appeal dismissed), 390 U.S. 745, 20 L.Ed. 276, 88 S.Ct. 1443 (1968) involved a motor freight trucking company conducting interstate commerce involving substantial local activities and property. The New Jersey business corporate tax was levied upon all corporations "in lieu of other State, county or local taxation upon or measured by intangible personal property." The measure of the tax was allocated net worth plus allocated net income. New Jersey did not levy an income tax and the state court commented that the business corporation tax has all the attributes of a direct levy on income (236 A.2d at 582). The New Jersey Supreme Court sustained the validity of the tax upon the basis of its "in lieu" features and upon the corporation's substantial local

activities, specifically, its vehicles which were registered elsewhere did not pay license fees to New Jersey but made extensive use of the state's highway system and the vehicles and cargoes enjoyed the protection of the state police. The court commented, however, after reviewing this Court's recent cases, that the minority view of *Spector Motor Service* has now become this Court's general view (236 A.2d 585).

This Court's dismissal of the appeal in the New Jersey case for want of a substantial federal question is fully supported by *Spector Motor Service* and other cases predicated upon the substantial local activities of the corporation and more particularly the "in lieu" features of the tax which this Court had approved in the second *Railway Express Agency* case in 1959. The language of the state court opinion, however, indicates a tendency to ignore the Commerce Clause as a viable restraint upon the state's taxing power.

Mid-Valley Pipeline Co. v. King, 431 S.W.2d 277 (Tenn. 1968); appeal dismissed, 393 U.S. 321, 21 L.Ed.2d 517, 89 S.Ct. 556 (1969) involved an excise tax levied upon allocated net earnings and a franchise tax levied upon capital stock surplus and undivided profits. The Tennessee Supreme Court sustained the application of the tax to an interstate common carrier of crude oil citing the New Jersey case and the earlier Tennessee case of *Texas Gas Transmission Corp. v. Atkins, supra*. The court held that local incidents or activities may be a basis for a franchise or excise tax, measured by properly apportioned net income of a foreign corporaion engaged solely in interstate commerce, provided the local activities can be separated from interstate commerce. The court further held that the company has and is employing or owning capital or property

in Tennessee and exercising its corporate franchise within Tennessee and that it maintains its rights of way and other valuable properties located in the state in its corporate capacity and further that it has and is using Tennessee courts to vindicate its rights. The Tennessee court held that these local activities, although incidental to the conduct of interstate commerce are taxable under the decisions of this court.

While the court did not specifically note that point, the Tennessee tax apparently had "in lieu" features since it was levied upon foreign corporations doing business in the state without qualifying to do business "as a recompense for the protection of their local activities and as compensation for the benefits they receive from doing business in Tennessee."

As noted above, this Court dismissed the appeal for want of a substantial federal question.

While each of these state court decisions may be justified upon the peculiar facts and particular state statutory provisions, they illustrate the continuing "inroads" into the heretofore generally accepted excise tax immunity of businesses engaged exclusively in interstate commerce. The Louisiana Supreme Court decision is the latest and most far-reaching of these decisions. We submit that the time has come for this Court to re-affirm the Commerce Clause as the intended safeguard against the free movement of goods between the states. In the final analysis, if the state cannot exact a levy as a condition of commencing interstate business, it ought not to be permitted, under the guise of fragmentation to exact a levy which must be paid as a requirement for continuing the conduct of an interstate business in the state.

II

LOUISIANA, WHICH ADMITTEDLY CANNOT DENY OR REFUSE AN OUT OF STATE CORPORATION THE RIGHT TO ENGAGE IN INTERSTATE BUSINESS WITHIN THE STATE IN CORPORATE FORM, CANNOT LEVY AN EXCISE TAX UPON THIS PRIVILEGE OF ENGAGING IN INTERSTATE BUSINESS IN CORPORATE FORM.

We suggest to the Court that the Louisiana corporation franchise tax, although couched in more sophisticated grammar, is actually the equivalent of the Kentucky license tax upon foreign corporations which this Court struck down in *Crutcher v. Kentucky*, 141 U.S. 47, 35 L.Ed. 649, 11 S.Ct. 851. Louisiana seeks to justify its tax by contending it is not a tax upon the privilege of doing interstate business, but is a **tax upon foreign corporations doing interstate business.**

A few references to the Louisiana Supreme Court's construction of the tax levy will make this plain:

> "The thrust of the statute is to tax not the interstate business done in Louisiana by a foreign corporation, **but the doing of business in Louisiana in a corporate form** . . ." (Jurisdictional Statement, p. 33; emphasis supplied.)

> ". . . (The statute) taxes not the general privilege of doing interstate business but simply the corporation's privilege of enjoying in a corporate capacity the ownership or use of its capital, plant or other property in this State, the corporation's privilege of exercising and continuing its corporate charter in the State of Louisiana, and the corporation's use of its corporate form to do business in the State." (Jurisdictional Statement, p. 39)

> ". . . the local incident taxed is the **form of doing business** rather than the business done by the corporation . . ." (Jurisdictional Statement, p. 40; emphasis by the Court)

In *Crutcher v. Kentucky, supra*, the state sought to sustain its license tax upon foreign corporations doing interstate business upon the grounds that the tax was non-discriminatory and levied upon local corporations as well. This Court held:

> ". . . **to carry on interstate commerce is not a franchise or a privilege granted by the state;** it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities as a matter of convenience in carrying out their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject.
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> • • •
>
> "We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it." (141 U.S. at 58, 35 L.Ed. at 652)
>
> See also *International Text-Book Co. v. Pigg*, 217 U.S. 91, 107, 54 L.Ed. 678, 685, 30 S.Ct. 481 (1910); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 66 L.Ed. 239, 42 S.Ct. 106; and *Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 6 L.Ed.2d 288, 81 S.Ct. 1913 (1961).

Although the Louisiana tax is couched in terms of the levy of a corporation franchise tax, it is the equivalent of a license tax because the state can completely shut off the flow

of commerce in connection with the levy and collection of the tax. As pointed out above, the payment of the tax is a condition precedent to the continuing conduct of interstate business in Louisiana. Under these circumstances, it should have no greater standing than the exaction of a levy as a condition of commencing interstate business in the state.

III

THE LEVY OF A STATE EXCISE TAX UPON THE PRIVILEGE OF ENGAGING IN INTERSTATE BUSINESS IN CORPORATE FORM, COUPLED WITH DRASTIC ENFORCEMENT AND COLLECTION PROCEDURES WHICH AUTHORIZE COMPLETE CESSATION OF THE INTERSTATE BUSINESS, IS THE EQUIVALENT OF A STATE LICENSE TO ENGAGE IN INTERSTATE COMMERCE AND IS PROHIBITED BY ARTICLE I, SECTION 8, CLAUSE 3 OF THE CONSTITUTION.

Louisiana's enforcement and collection procedures are both drastic and summary.

Section 401 of the Louisiana law provides that failure to pay the tax authorizes the collector to rule the taxpayer into court to show cause why he should not be ordered to cease "further pursuit of the business taxed." The rule is required to be heard in not less than two nor more than ten days and is heard by preference. "If the rule is made absolute, the order therein rendered shall be considered a judgment in favor of the state prohibiting the taxpayer from the further pursuit of the business until such time as he has paid the delinquent tax, interest, penalties and costs, and every violation of the

injunction shall be considered a contempt of court, and punished according to law."

Thus, had Colonial not paid the franchise tax, Louisiana could have obtained an injunction, within ten days, ordering Colonial to cease "further pursuit of the business taxed." Since the business taxed and Colonial's only business, is the interstate transportation of refined petroleum products, Louisiana could almost instantly shut off the flow of commerce, depriving the other 13 states and the District of Columbia of vital energy supplies.

It was estimated in the first Colonial case in 1968 that the cost to Colonial of such a shutdown was $15,000 to $16,000 per hour (testimony of Whitaker, Pl. Ex. P-17, p.26, R51). No doubt the hourly cost would be greater today. The 1968 figures do not consider the cost of such a shutdown to Colonial's shippers and consignees nor the resulting loss of energy supplies to consumers in other states and the District of Columbia which are served by Colonial's system.

La. Rev. Stat. 47:1641 provides that failure to pay the tax is a felony, punishable by a fine of not more than ten thousand dollars or imprisonment for not more than five years or both.

Section 1570 defines "distraint" as the right to levy upon and seize and sell "any property or rights to property of the taxpayer." Under Sections 1571-1573 the collector, at his discretion may distrain any property of a taxpayer by making a list of the property seized and mailing a copy to the taxpayer, along with a note of the sum demanded and a notice of the time and place where the property will be sold. The sale may

be held 15 calendar days from the date of the notice mailed to the taxpayer.

Thus, had Colonial not paid the tax, the state could have charged Colonial with a felony, and shut down the pipeline within ten days, moreover, within fifteen days the state could have sold at public auction enough of Colonial's interstate facilities to pay tax, interest, penalties and costs of collection.

Had the collector so chosen, he could have also proceeded against Colonial by summary court proceedings under section 1574, upon not less than two nor more than ten days notice. No new trial, rehearing or devolutive appeals are allowed from any such summary judgment. Suspensive appeals are authorized by the statutes but only upon posting bond in a sum double that of the total amount of the judgment, including costs.

Under La. Rev. Stat. 47:1577 the collector is further authorized to record notice of such alleged tax in any parish where Colonial owns property and the alleged tax then operates as a "lien, privilege and mortgage on all of the property" of Colonial in the State of Louisiana.

In view of Louisiana's drastic enforcement and collection procedures which authorize the state officials to summarily shut down interstate operations, the holding of the Court of Appeals, in *Ideal Cement Co. v. United Gas Pipe Line*, Fifth Circuit, 1960, 282 F.2d 574 (cert. denied, 369 U.S. 837, 7 L.Ed.2d 842, 82 S.Ct. 863), is apropos here:

> "• • • What the City has done in this case, by the words of its ordinance, is to make the procurement of a license a precondition of engaging in interstate commerce within its jurisdiction.

> "Nor is the evil attending license taxes on interstate commerce merely a question of labels. Provisions for the levy of license taxes are ordinarily accompanied by summary collection procedures. So here, the Alabama Code provides for injunctions against firms who fail to pay municipal license taxes on time. Thus, the effect of nonpayment of a license tax is not the usual slight disruption of commerce which may follow a levy on a delinquent taxpayer's property. Rather, interstate commerce is brought to an immediate halt by means of the injunctive remedy. Moreover, doing business without a license will bring down the violator extreme criminal sanctions."

In *Crutcher v. Kentucky, supra*, the state's tax was an outright license tax imposed upon foreign corporations who wished to do business in Kentucky. The Louisiana statute as construed by the state's highest court is a franchise tax imposed upon foreign corporations who wish to do interstate business in corporate form[5] in Louisiana. Louisiana cannot deny appellant's right to do business in the corporate form in Louisiana. *Crutcher v. Kentucky* holds that the power of Congress over interstate commerce is as absolute as it is over foreign commerce and points out that the prerogative, the responsibility and the duty of providing for the security of the citizens and the people of the United States in relation to foreign corporate bodies, or foreign individuals with whom they may have relations of foreign commerce belong to the government of the United States and not to the governments of the several states. Further, *Crutcher* holds: "and the same thing is exactly true with respect to interstate commerce as it is with respect to foreign commerce." (141 U.S. at 58)

Thus it is plain that Colonial's privilege of engaging in

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[5] We take it as self-evident that a corporation cannot do business, interstate or otherwise, in other than its corporate capacity.

interstate transportation in and through Louisiana in corporate form flows from the United States, not the state.

Tests or questions propounded in earlier decisions of this Court and alluded to by the State court become pertinent: "whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded." (*General Motors v. Washington, supra*, 377 U.S. at 441); "the controlling question is whether the State has given anything for which it can ask return." (*Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 85 L.Ed. 267, 61 S.Ct. 246 (1940))

While Colonial owns property in Louisiana which receives protection from state and local authorities, Colonial pays substantial ad valorem and income taxes for whatever "opportunities and protections" flow from property ownership.

Under *Crutcher v. Kentucky, supra*, to carry on interstate commerce in corporate form is not a right or privilege granted by the state; thus Louisiana has not afforded to appellant the very "operating incidence" upon which it seeks to levy the tax. **And since Louisiana has not given appellant the right or privilege of doing interstate business in corporate form, the state cannot ask a return for it.**

As construed by Louisiana's highest court, the state tax is levied upon appellant's privilege of carrying on interstate commerce in corporate form. That is not a privilege bestowed by Louisiana and the practical result of the statute is to require out-of-state corporations to take out a license for carrying on interstate commerce.

While great respect is due the determination of the operating incidence of a state tax, *Memphis Natural Gas v. Stone, supra*, it is not conclusive upon this Court, which must consider and determine the practical effect of the tax upon interstate commerce, first *Railway Express* case, and second *Railway Express* case, *supra*.

The practical operating result of the Louisiana tax is a privilege, license or occupation tax upon appellant's interstate transportation business in circumstances where Louisiana does not contribute to the furtherance of that interstate business, and under circumstances where Louisiana can shut off the flow of interstate commerce through collection procedures which compel a cessation of Colonial's interstate business in the absence of payment.

CONCLUSION

It is submitted that La. Rev. Stat. 47:601, as construed by the highest court of Louisiana, is an unconstitutional burden upon interstate commerce under the Facts of this case. We respectfully ask that this Court enter judgment reversing the judgment of the Supreme Court of Louisiana, declare the statute unconstitutional as it applies to Colonial, and grant Colonial judgment against the Collector in the amount of $150,719.80, together with interest as prescribed by law.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned, one of the attorneys for Colonial Pipeline Company, plaintiff-appellant herein, and a member of the Bar of the Supreme Court of the United States hereby certifies that on the 29th day of July, 1974, I served three copies of the foregoing brief on Joseph N. Traigle, successor in office to E. Lee Agerton, Collector of Revenue, defendant-appellee herein, by placing same in an envelope addressed to his counsel of record, Chapman L. Sanford, and Whit M. Cook II, State of Louisiana, Department of Revenue, Legal Division, Post Office Box 201, Baton Rouge, Louisiana 70821, and depositing said envelope in the United States post office at Baton Rouge, Louisiana, with first class postage prepaid.

Baton Rouge, Louisiana, this 29th day of July, 1974.

R. Gordon Kean, Jr.

APPENDIX

STATUTES INVOLVED

The following sections of Title 47 of the Louisiana Revised Statutes are involved in this case:

§ 401. Failure to pay tax; judgment prohibiting further pursuit of business

Failure to pay the tax levied by this Chapter shall ipso facto, without demand or putting in default, cause the tax, interest, penalties and costs to become immediately delinquent, and the collector of revenue is hereby vested with authority, on motion in a court of competent jurisdiction, to take a rule on the delinquent taxpayer to show cause in not less than two nor more than ten days, exclusive of holidays, why the delinquent taxpayer should not be ordered to cease from further pursuit of the business taxed under this Chapter. This rule may be tried out of term and in chambers, and shall always be tried by preference. If the rule is made absolute, the order therein rendered shall be considered a judgment in favor of the state prohibiting the taxpayer from the further pursuit of the business until such time as he has paid the delinquent tax, interest, penalties and costs, and every violation of the injunction shall be considered a contempt of court, and punished according to law.

§ 601. Imposition of tax (before 1970 amendment)

Every domestic corporation and every foreign corporation, exercising its charter, authorized to do or doing business in this state, or owning or using any part or all of its capital or plant in this state, subject to compliance with all other provisions of law, except as otherwise provided for in this chapter shall pay a tax at the rate of one dollar and 50/100 ($1.50) for each one thousand dollars ($1,000.00), or major fraction thereof on the amount of its capital stock, surplus, undivided

profits, and borrowed capital, determined as hereinafter provided; the minimum tax shall not be less than ten dollars ($10.00) in any case. The tax levied herein is due and payable for the privilege of carrying on or doing business, the exercising of its charter or the continuance of its charter within this state, or owning or using any part or all of its capital or plant in this state.

Amended by Acts 1958, No. 437.

§ 601. Imposition of tax (After 1970 Amendment)

Every domestic corporation and every foreign corporation, exercising its charter, or qualified to do business or actually doing business in this state, or owning or using any part or all of its capital, plant or any other property in this state, subject to compliance with all other provisions of law, except as otherwise provided for in this Chapter shall pay an annual tax at the rate of $1.50 for each $1,000.00, or major fraction thereof on the amount of its capital stock, surplus, undivided profits, and borrowed capital, determined as hereinafter provided; the minimum tax shall not be less than $10.00 per year in any case. The tax levied herein is due and payable on any one or all of the following alternative incidents.

(1) The qualification to carry on or do business in this state or the actual doing of business within this state in a corporate form. The term "doing business" as used herein shall mean and include each and every act, power, right, privilege, or immunity exercised or enjoyed in this state, as an incident to or by virtue of the powers and privileges acquired by the nature of such organization, as well as, the buying, selling or procuring of services or property.

(2) The exercising of a corporation's charter or the continuance of its charter within this state.

(3) The owning or using any part or all of its capital, plant or other property in this state in a corporate capacity.

It being the purpose of this section to require the payment of this tax to the State of Louisiana by domestic corporations for the right granted by the laws of this state to exist as such an organization, and by both domestic and foreign corporations for the enjoyment, under the protection of the laws of this state, of the powers, rights, privileges and immunities derived by reason of the corporate form of existence and operation. The tax hereby imposed shall be in addition to all other taxes levied by any other statute.

As used herein the term "domestic corporation" shall mean and include all corporations, joint stock companies or associations, or other business organizations organized under the laws of this state which have privileges, powers, rights or immunities not possessed by individuals or partnerships. The term "foreign corporation" shall mean and include all such business organizations as hereinbefore described in this paragraph which are organized under the laws of any state, territory or district, or foreign country.

Amended by Acts 1970, No. 325.

§ 606. Allocation of taxable capital

A. General allocation formula.

For the purpose of ascertaining the tax imposed in this Chapter, every corporation subject to the tax is deemed to have employed in this state the proportion of its entire issued and outstanding capital stock, surplus, undivided profits and borrowed capital, computed on the basis of the ratio obtained by taking the arithmetical average of the following ratios:

(1) The ratio that the net sales made to customers in the regular course of business and other revenue attributable to

Louisiana bears to the total net sales made to customers in the regular course of business and other revenue. For the purposes of this Sub-section net sales and other revenues attributable to Louisiana shall be determined as follows:

(a) Sales attributable to this state shall be all sales where the goods, merchandise or property is received in this state by the purchaser. In the case of delivery of goods by common carrier or by other means of transportation, including transportation by the purchaser, the place at which the goods are ultimately received after all transportation has been completed shall be considered as the place at which the goods are received by the purchaser. However, direct delivery into this state by the taxpayer to a person or firm designated by a purchaser from within or without the state shall constitute delivery to the purchaser in this state. Revenue derived from a sale of property not made in the regular course of business shall not be considered.

(b) Revenues attributable to this state derived from air transportation shall include all gross receipts derived from passenger journeys and cargo shipments originating in Louisiana.

(c) Revenues attributable to this state derived from transportation of crude petroleum, natural gas, petroleum products or other commodities for others through pipelines shall include all gross revenue derived from operations entirely within this state plus a portion of any revenue from operations partly within and partly without this state, based upon the ratio of the number of units of transportation service performed in Louisiana in connection with such revenue to the total of such units. A unit of transportation service shall be the transporting of any designated quantity of crude petroleum, natural gas, petroleum products or other commodities for any designated distance.

(d) Revenues attributable to this state derived from transportation other than aircraft or pipeline shall include all

such income that is derived entirely from sources within this state, and a portion of revenue from transportation partly without and partly within this state, to be prorated subject to rules, and regulations of the collector, which shall give due consideration to the proportion of service performed in Louisiana.

(e) Revenues from services other than those described above shall be attributed within and without Louisiana on the basis of the location at which the services are rendered.

(f) Rents and royalties from immovable or corporeal movable property, shall be attributed to the state where such property is located at the time the revenue is derived.

(g) Interest on customers' notes and accounts shall be attributed to the state in which such customers are located.

(h) Other interest and dividends shall be attributed to the state in which the securities or credits producing such revenue have their situs, which shall be at the business situs of such securities or credits, if they have been so used in connection with the taxpayer's business as to acquire a business situs, or, in the absence of such a business situs shall be at the commercial domicile of the corporation.

(i) Royalties or similar revenue from the use of patents, trade marks, copyrights, secret processes and other similar intangible rights shall be attributed to the state or states in which such rights are used.

(j) Revenues from a parent or subsidiary corporation shall be allocated as provided in Sub-section B of this Section.

(k) All other revenues shall be attributed within and without this state on the basis of such ratio or ratios, prescribed by the collector, as may be reasonably applicable to the type of revenues and business involved.

(2) The ratio that the value of all of the taxpayer's property and assets situated or used in Louisiana bears to the value of all of its property and assets wherever situated or used. In determining value, depreciation and depletion reserves must be deducted from the book values of the properties in question. The various classes of property and assets shown below shall be allocated within and without Louisiana on the bases indicated:

(a) Cash shall be allocated to the state in which located.

(b) Cash in banks and temporary cash investments shall be allocated to the state in which they have their business situs, or in the absence of a business situs, to the state in which is located the commercial domicile of the taxpayer.

(c) Trade accounts and trade notes receivable shall be allocated by reference to the transactions from which the receivables arose, on the basis of the location at which delivery was made in the case of sale of merchandise or the location at which the services were performed in case of charges for services rendered.

(d) Investments in and advances to a parent or subsidiary shall be allocated as provided in Sub-section B of this Section.

(e) Notes and accounts other than those notes and accounts described under items (b) through (d) above shall be allocated to the state in which they have their business situs, or in the absence of a business situs, to the state in which is located the commercial domicile of the taxpayer.

(f) Stocks and bonds not included in (b) or (d) above shall be allocated to the state in which they have their business situs or in the absence of a business situs to the state in which is located the commercial domicile of the taxpayer.

(g) Immovable and corporeal movable property shall be allocated within and without Louisiana on the basis of actual location. Corporeal movable property of a class which is not normally located within a particular state the entire taxable year shall be allocated within and without Louisiana by use of a ratio or ratios which shall give due consideration to the usage within and without this state. Mineral leases and royalty interests shall be allocated to the state in which the property covered by the lease or royalty interest is located.

(h) All other assets shall be allocated within or without Louisiana on the basis, prescribed by the collector, as may reasonably be applicable to the assets and the type of business involved.

B. **Allocation of intercompany items.** For the purpose of allocation, investments in, advances to, or revenues from a parent or subsidiary corporation shall be allocated to Louisiana on the basis of the percentage of capital employed in Louisiana for corporation franchise tax purposes by the parent or subsidiary corporation. A subsidiary corporation is any corporation the majority of the capital stock of which is actually, wholly or substantially owned by another corporation and whose management, business policies and operations are, howsoever, actually, wholly or substantially controlled by another corporation; which latter corporation shall be termed the parent corporation.

C. **Minimum allocation: assessed value of real and personal property.** The portion of capital stock, surplus, undivided profits and borrowed capital allocated for franchise taxation under this Chapter shall in no case be less than the total assessed value of real and personal property in this state of each such domestic or foreign corporation for the calendar year preceding that in which the tax is due.

§ 1501. Definitions

The terms "Collector" or "Collector of Revenue" when

used in this Title mean the Collector of Revenue for the State of Louisiana. The term "Sub-title" means and includes all the chapters in Sub-title II of this Title 47 and any other Chapter of these Revised Statutes, the administration of which has been delegated to the Collector of Revenue.

§ 1561. Alternative remedies for the collection of taxes

In addition to following any of the special remedies provided in the various Chapters of this Sub-title, the collector may, within his discretion, proceed to enforce the collection of any taxes due under this Sub-title, by means of any of the following alternative remedies or procedures:

(1) Assessment and distraint, as provided in R.S. 47:1562 through 47:1573.

(2) Summary court proceeding, as provided in R.S. 47:1574.

(3) Ordinary suit under the provisions of the general laws regulating actions for the enforcement of obligations.

The collector may choose which of these procedures he will pursue in each case, and the counter-remedies and delays to which the taxpayer will be entitled will be only those which are not inconsistent with the proceeding initiated by the collector; provided that in every case the taxpayer shall be entitled to proceed under R.S. 47:1576 except after he has filed a petition with the board of tax appeals for a redetermination of the assessment, and except when there is pending against him a suit involving the same tax obligation; and provided further, that the fact that the collector has initiated proceedings under the assessment and distraint procedure will not preclude him from thereafter proceeding by summary or ordinary court proceedings for the enforcement of the same tax obligation.

§ 1570. Distraint defined

The words "distraint" or "distrain" as used in this Subtitle, shall be construed to mean the right to levy upon and seize and sell, or the levying upon or seizing and selling, of any property or rights to property of the taxpayer including goods, chattels, effects, stocks, securities, bank accounts, evidences of debt, wages, real estate and other forms of property, by the collector or his authorized assistants, for the purpose of satisfying any assessment tax, penalty or interest due under the provisions of this Sub-title.

Property exempt from seizure by Articles 644 and 645 of the Louisiana Code of Practice is exempt from distraint and sale herein.

§ 1571. Distraint procedure

Whenever the collector or his authorized assistants shall distrain any property of a taxpayer, he shall cause to be made a list of the property or effects distrained, a copy of which, signed by the collector or his authorized assistants shall be sent by registered mail to the taxpayer at his last known residence or business address, or served on the taxpayer in person. This list shall be accompanied with a note of the sum demanded and a notice of the time and place where the property will be sold. Thereafter, the collector shall cause a notice to be published in the official journal of the parish wherein the distraint is made, specifying the property distrained, and the time and place of sale. The sale shall be held not less than fifteen calendar days from the date of the notice mailed or served on the taxpayer or the date of publication in the official journal, whichever is later. The collector may postpone such sale from time to time, if he deems it advisable, but not for a time to exceed thirty calendar days in all. If the sale is continued to a new date it shall be readvertised.

§ 1572. Surrender of property subject to distraint

Any person in possession of property or rights to property subject to distraint, upon which a levy has been made, shall, upon demand by the collector or his authorized assistants, making such levy, surrender such property or rights to the collector or his authorized assistants, unless such property or right is, at the time of such demand, subject to an attachment or execution under any judicial process. Any person failing or refusing to surrender any such property or rights shall be liable to the state in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes, penalties, and interest and other costs and charges which are due.

§ 1573. Sale of distrained property

The collector, or his authorized assistants, shall sell at public auction for cash to the highest bidder so much of the property distrained by him as may be sufficient to satisfy the tax, penalties, interest, and costs due. He shall give to the purchaser a certificate of sale which will be prima facie evidence of the right of the collector to make the sale, and conclusive evidence of the regularity of his proceedings in making the sale, and which will transfer to the purchaser all right, title and interest of the taxpayer in and to the property sold.

Out of the proceeds of the sale, the collector shall first pay all costs of the sale and then apply so much of the balance of the proceeds as may be necessary to pay the assessment. Any balance beyond this shall be paid to the taxpayer.

§ 1574. Collection by summary court proceeding authorized

In addition to any other procedure provided in this Subtitle or elsewhere in the laws of this state; and for the purpose of facilitating and expediting the determination and trial

of all claims for taxes, penalties, interest, attorney fees, or other costs and charges arising under this Sub-title, there is hereby provided a summary proceeding for the hearing and determination of all claims by or on behalf of the state, or by or on behalf of the collector, for taxes, excises, and licenses and for the penalties, interest, attorney fees, costs or other charges due thereon, by preference in all courts, all as follows:

(1) All such proceedings, whether original or by intervention or third opposition, or otherwise, brought by or on behalf of the state, or by or on behalf of the collector, for the determination or collection of any tax, excise, license, interest, penalty, attorney fees, costs or other charge, claimed to be due under any provision of this Sub-title, shall be summary and shall always be tried or heard by preference, in all courts, original and appellate, whether in or out of term time, and either in open court or chambers, at such time as may be fixed by the court, which shall be not less than two nor more than ten days after notice to the defendant or opposing party.

(2) All defenses, whether by exception or to the merits, made or intended to be made to any such claim, must be presented at one time and filed in the court of original jurisdiction prior to the time fixed for the hearing, and no court shall consider any defense unless so presented and filed. This provision shall be construed to deny to any court the right to extend the time for pleading defenses; and no continuance shall be granted by any court to any defendant except for legal grounds set forth in the Louisiana Code of Practice.

(3) That all matters involving any such claim shall be decided within forty-eight hours after submission, whether in term time or in vacation, and whether in the court of first instance or in an appellate court; and all judgments sustaining any such claim shall be rendered and signed the same day, and shall become final and executory on the fifth calendar day after rendition. No new trial, rehearing or devolutive appeal

shall be allowed. Suspensive appeals may be granted, but must be perfected within five calendar days from the rendition of the judgment by giving of bond, with good and solvent security, in a sum double that of the total amount of the judgment, including costs. Such appeals, whether to a court of appeals or to the Supreme Court, shall be made returnable in not more than fifteen calendar days from the rendition of the judgment.

(4) Whenever the pleadings filed on behalf of the state, or on behalf of the collector, shall be accompanied by an affidavit of the collector or of one of his assistants or representatives or of the counsel or attorney filing the same, that the facts as alleged are true to the best of the affiant's knowledge or belief, all of the facts alleged in said pleadings shall be accepted as prima facie true and as constituting a prima facie case, and the burden of proof to establish anything to the contrary shall rest wholly on the defendant or opposing party.

§ 1577. Tax obligation to constitute a lien, privilege and mortgage

Except as is specifically provided in the laws regulating building and loan associations, any tax, penalty, interest or attorney fee due under the provisions of this Sub-title, shall operate as a lien, privilege and mortgage on all of the property of the tax debtor, both movable and immovable, which said lien, privilege and mortgage shall be enforceable in any court of competent jurisdiction in an action, at law, or may be enforced as otherwise provided by this Sub-title. The collector may cause notice of such lien, privilege and mortgage to be recorded at any time after the tax becomes due, whether assessed or not, and regardless of whether or not then payable, in the mortgage records of any parish wherein the collector has reason to believe the tax debtor owns property. The lien, privilege and mortgage created by this section shall affect third parties only from the date of recordation and shall take their respective ranks by virtue of recordation.

§ 1641. Criminal penalty for failing to account for state tax moneys

Any person required under this subtitle to collect, account for, or pay over any tax, penalty, or interest imposed by this subtitle, who willfully fails to collect or truthfully account for or pay over such tax, penalty, or interest, shall in addition to other penalties provided by law, be fined not more than ten thousand dollars or imprisoned, with or without hard labor, for not more than five years, or both.

Amended by Acts 1972, No. 366, § 1.